MURAD SHARIFF & ORS.

v.

IBRAHIM SAID & ANOR.

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL APPEAL NO. 22/80]
18 FEBRUARY 1983

LAND LAW: *Claim under s. 53(1) National Land Code (Penang and Malacca Titles) Act 1963 - Order by Commissioner of Land Titles, Penang, following enquiry under s. 54(1) - Whether null and void - Breach of rules of natural justice - Order of Land Titles Appeal Board, Penang - Whether without jurisdiction; allegation of fraud and forgery - Burden of proof; claim of ownership - Burden of proof - Possession - Relevance of - Whether adverse - To extent relevant - Conflicting evidence - Whether properly evaluated.*

EVIDENCE: *Forgery - Ownership - Burden of proof.*

The appeal was from a decision of the Land Titles Appeal Board, Penang ("the Board") under s. 19 of the National Land Code (Penang and Malacca Titles) Act 1963 ("the Act"). A claim was made by the appellants to have certain holdings registered in the name of Shariff bin Ibrahim (now deceased). An enquiry was held by the then Commissioner of Land Titles, Penang, Mr. Liew Siew Kim under s. 54(1) of the Act. The claim was rejected by his successor, Mr. Lim Teng Kee. An appeal to the Board was dismissed. The appellants appealed.

Held:

A. Jurisdiction

[1] The order of the second Commissioner was null and void as there was a breach of rules of natural justice. The second Commissioner had no power to make the order he did on the appellant's claim because he had not held the inquiry, nor had he heard or recorded the evidence under s. 54(2) of the Act. Moreover, there was conflict of evidence and the appellants' former Counsel did not request or agree that the second Commissioner should give his decision on the case. [*R. v. Huntingdon Confirming Authority* [1929] 1 KB 698; *British Metal Corporation Limited v. Ludlow Limited* [1938] 1 All ER 135; *S. Seethainayagee Ammal v. M.R.N. Ramasamy Chettiar* [1940] MLJ 231].

[2] It did not mean that because the appellants' former Counsel had withdrawn a preliminary objection regarding the jurisdiction of the Board to confirm the void order of the Commissioner, the appellants could not be allowed to raise the matter on appeal to the High Court. A rule of natural justice which goes to the very basis of the case cannot be waived, nor can waiver convert nullity into validity [*Mayes v. Mayes* [1971] 1 WLR 679, 684, *Shanmugam v. Pitchamany & Anor.* [1976] 2 MLJ 222; In *Re Application of British Reinforced Concrete Engineering Co. Limited* 45 TLR 186].

[3] The Board had no jurisdiction to confirm the Commissioner's order.

B. Burden of Proof: Fraud and Forgery

[1] There was no reason why the Commissioner or the Board could not hear the case even though the issue of forgery had been raised.

[2] The burden of proving execution and genuineness of the mortgage, which execution was alleged by the appellants to be a forgery, fell on the respondents. The initial burden of proving execution is upon the person alleging it. [*Ooi Choon Lye v. Lim Boon Kheng & Ors.* 4 MC 172].

C. Burden of Proof: Ownership

The Commissioner and the Board should have given consideration to the evidence that the late Shariff had been in possession of the lands for more than 48 years. Possession is *prima facie* evidence of title and the burden of proving a person in possession is not the owner is on the person who affirms he is not [s. 110, Evidence Act, 1950; *Perry v. Clissold & Ors.* [1907] AC 73, 79].

D. Adverse Possession

Neither the Commissioner nor the Board had evaluated the conflicting evidence regarding adverse possession before making a decision.

[Appeal allowed.]

Cases referred to:
R v. Huntingdon Confirming Authority [1929] 1 KB 698
British Metal Corporation Limited v. Ludlow Limited [1938] 1 All ER 135
S. Seethainayagee Ammal v. M.R.N. Ramasamy Chettiar [1940] MLJ 231
Mayes v. Mayes [1971] 1 WLR 679
Shanmugam v. Pitchamany & Anor [1976] 2 MLJ 222
In Re Application of British Reinforced Concrete Engineering Co. Limited 45 TLR 186
Ooi Choon Lye v. Lim Boon Kheng & Ors. 4 MC 172
Perry v. Clissold & Ors. [1907] AC 73

Legislation referred to:
Evidence Act 1950, s. 110

For the appellants - Mohideen Abdul Kader; M/s. Sykt. Mohideen Abdul Kader
For the respondents - V.M. Mohan; M/s. V.M. Mohan

JUDGMENT

Gunn Chit Tuan J:

This was another appeal from a decision of the Land Titles Appeal Board, Penang, (the Board) under s. 19 of the National Land Code (Penang and Malacca Titles) Act 1963. The abovenamed appellants made a claim in 1973 under s. 53(1) of the said Act in respect of holdings nos. 1022, 1024 Mukim 11 and 460 and 553, Mukim 16 Seberang Prai Utara (the said lands) to have them registered in the name of Shariff bin Ibrahim, deceased, the late father of the first, third and fourth appellants and the late husband of the second appellant. Pursuant to that claim the then Commissioner of Land Titles, Penang, Mr. Liew Siew Kim held an inquiry in 1976 under s. 54(1) of the said Act and the appellants' claim was rejected by his successor, Mr. Lim Teng Kee on 9 August 1977. The appellants appealed to the Board which dismissed their appeal on 10 January 1980.

There were seven grounds of appeal in the appellants' memorandum of appeal but it was only necessary to consider the following grounds:

(a) Excess of Jurisdiction.

It was submitted by Mr. Mohideen Abdul Kader, Counsel for the appellants, that the Commissioner, Mr. Lim Teng Kee who gave the decision in this case, had no power to make the order in 1977 rejecting the appellants' claim because he did not hold the inquiry and hear and record the evidence under s. 54(2) of the said Act. He pointed out that there had been a breach of the rules of natural justice and that the said Commissioner's order was

nullity and void. The Board therefore had no jurisdiction to confirm the void order of the Commissioner. Counsel referred to the *R. v. Huntingdon Confirming Authority* [1929] 1 KB 698 in which Lord Hanworth HR said as follows:

> One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on 25 April, but who appeared at the meeting of 16 May. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on 25 April may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who have not heard the case for the purpose of reaching a decision, on this question of confirmation.

Reference was also made to the English Court of Appeal case of *British Metal Corporation Limited v. Ludlow Limited* [1938] 1 All ER 135 where a contract for the sale of goods was entered into

> subject to the customary terms and conditions and subject to the rules and regulations of the London Metal Exchange, in so far as these rules and regulations do not conflict with the provisions of this contract.

A dispute having arisen the matter was referred to two arbitrators, who, having heard the parties, decided that it was necessary to appoint a third arbitrator. The third arbitrator did not hear the parties, nor was his appointment indicated to them and they only became aware of it upon receiving the award. It was held *inter alia* that when a third arbitrator was appointed, the arbitral tribunal then consisted of all three, and, by the rules of the London Metal Exchange, the hearing must take place before them all. It was therefore impossible to treat the award in the case as being an award of two arbitrators only, and it was therefore set aside. Counsel also referred to a Malaysian case which I considered relevant to the facts of this case. In that case of *S. Seethainayagee Ammal v. M.R.N. Ramasamy Chettiar* [1940] MLJ 231, a chargee, on his application for sale, gave evidence and was cross-examined for two days before one Collector of Land Revenue. The hearing was continued before another Collector who made an order for sale. The evidence of the chargee, upon which the case depended was challenged and it was held by Poyser CJ that in the absence of any statutory provision, it is at least irregular, if not unlawful, for a Judge to continue the hearing of a case which has been part-heard by another Judge; and particularly so where there is a conflict of evidence. Finally, Counsel drew the attention of the Court to a dictum of Sir Jocelyn Simon P in the recent English case of *Mayes v. Mayes* [1971] 1 WLR 679, 684

> that a rule of natural justice which goes to the very basis of judicature cannot be waived. You cannot by wavier convert a nullity into a validity.

In his reply on this ground, Mr. Mohan, Counsel for the respondents, pointed out that a preliminary objection on this point was in fact raised by Mr. Oliver Phipps, the appellants' former Counsel when he appeared before the Board but the objection was subsequently withdrawn. It was the contention of Mr. Mohan that the appellants could not therefore raise as issue which was not raised at the appeal before the Board. He also referred to *Shanmugam v. Pitchamany & Anor.* [1976] 2 MLJ 222 in which case a divorce petition had been heard by the late Mr. Justice Sharma and had been adjourned. When the case came up for continuation, Counsel for the parties applied for the case to be continued and not heard *de novo* on the grounds that all the witnesses except one had already been heard. Hashim Yeop A. Sani J (as he then was) agreed to the said application subject to full liberty of both Counsel to recall and to re-examine any witness as they might wish and to resubmit on any point. In that case His Lordship had in mind the case *In Re Application of British Reinforced Concrete Engineering Co. Limited* 45 TLR 186 (which was also referred to by Poyser CJ in

the said *S. Seethainayagee Ammal's* case [1940] MLJ 231) in which it was held that where during proceedings without a jury, after some of the witnesses have been called, the presiding Judge dies, another Judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the shorthand notes of the evidence, and need not have the witnesses recalled. Mr. Mohan stated that the Board gave the appellants an opportunity to recall any witness and to introduce new evidence. As they chose not to do so and proceeded with the appeal, he considered that it would be highly prejudicial to the respondents' interests to delay this matter any further and that no injustice whatsoever had been caused to any party. He also pointed out that the Board had indicated in its judgment that they had this issue in mind before proceeding to hear the appellants' appeal. With respect to the arguments of Mr. Mohan, I considered that the answer to his contention that because the appellants' former Counsel had withdrawn a preliminary objection on this point the appellants could not be allowed to raise the matter on appeal to the High Court, is to be found in the dictum of Sir Jocelyn Simon P referred to above which I respectfully adopted and, that is, a rule of natural justice which goes to the very basis of the case cannot be waived. It is clear from the various authorities referred to by Counsel for the appellants that the order of the second Commissioner, Mr. Lim Teng Kee, was null and void as there had been a breach of the rules of natural justice even if this preliminary objection on that point had been withdrawn by the appellants' former Counsel before the Board. The waiver by Counsel could not convert a nullity into a validity. Moreover, *Shanmugam's* case [1976] 2 MLJ 222 is not applicable to the facts of this case because a perusal of the records reveal that there was a conflict of evidence and that the former Counsel for both parties did not request or agree that the Commissioner, Mr. Lim Teng Kee, who did not hear the inquiry under s. 54(2) of the said Act, should give his decision in this case. On this ground alone the appeal was allowed by me and the decision of the Board set aside but the following other grounds raised by Counsel should also be dealt with.

(b) Burden of Proof Relating to Fraud and Forgery.

According to the entries in the register of deeds the said lands were mortgaged by the said Shariff bin Ibrahim (deceased) and Mohd. Sahid bin Ibrahim (deceased), the respondents' late father, to a chettiar in 1933. According to the entries the said lands were auctioned in 1934 because they defaulted in payment of the mortgage debt and the said lands were bought by the respondents' late father. Learned Counsel for the appellants contended that the Board had held wrongly that the onus was on the appellants to prove that the mortgage was fraudulent. The appellants' contention was that the said Shariff did not execute the said mortgage which would mean that it was a forgery. Counsel pointed out that since execution of the said mortgage was denied by the appellants the onus was on the respondents to prove execution. He referred to the following passage at p. 890 in *Sarkar on Evidence* (12th Edn.):

> A document executed in favour of defendants was registered although the plaintiff denied execution and alleged it to be a forgery. In a suit by the plaintiff to have the document cancelled the burden of proving execution and genuineness is upon the defendant (*Mohima v. Jugal*, 7 C 739; 9 CLR 471).

Counsel also referred to the case of *Ooi Choon Lye v. Lim Boon Kheng & Ors.* 4 MC 172. In that case the appellant sued for certain monies and relied *inter alia* on a receipt which the respondents said was forged. The appellant argued that once the respondents set up the allegation of forgery, the onus fell upon them to prove the same. It was held by the Federal Court that it was not right to say that the appellant had only to tender the receipt in evidence to establish his case. The initial burden of proving execution when it is denied is upon the person alleging it.

On this ground of appeal, Mr. Mohan merely expressed, the view that the appellants might rely on the issue of forgery and contend that the case ought to be heard in the High Court and not by a Commissioner of Land Titles. He contended that there are no statutory provisions limiting the Commissioner's powers at an enquiry. I saw no reason why a Commissioner or the Board itself could not hear the case even if the issue of forgery is raised provided of course that there is no misdirection on the onus of proof and, that is, where one party denies the execution of a document his pleas of *non est factum* and fraud do not amount to an admission of due execution to relieve the other party from proving its execution.

(c) Burden of Proof as to Ownership

It was the contention of the appellants that they had on the balance of probabilities established their claim by a conveyance dated 28 September 1925 to show that the said lands were transfered by Shariff's father to himself for life and thereafter to Shariff and the respondents' late father as joint tenants. With the title deed in Shariff's possession until his death and thereafter in the possession of his wife, the second appellant in this case, the appellants have adduced evidence that the late Shariff had been in possession of the said lands for more than 48 years i.e. from 1925 until his death in 1973. It was the contention of Counsel that once possession is proved, it is *prima facie* evidence of title as possession also confers title in the person having possession except against a person with a superior title. Reference was made to s. 110 of the Evidence Act, 1950, which is as follows:

> When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Counsel also referred to the Privy Council case of *Perry v. Clissold and Ors.* [1907] AC 73, 79 in which Lord Macnaghten said as follows:

> It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.

It was therefore the contention of Mr. Mohideen Abdul Kader that since the appellants have established that the late Shariff had possession of the said lands the onus was now on the respondents to show that their late father Said had a superior title which means that they would have to prove the purported mortgage and subsequent sale to their late father. It was finally contended that as the respondents have failed to prove the alleged facts their claim must therefore fail. Mr. Mohan did not touch on this ground in his written or oral submission, but I agreed with Mr. Mohideen Abdul Kadir that the Commissioner and the Board should have also given consideration to evidence on this point before making a decision in the matter.

(d) Adverse Possession

The last ground of appeal was that the Board had erred in deciding that the late Shariff's occupation of the said lands was permissive and not adverse. Counsel stated that the claim based on the alternative ground of adverse possession need only be considered if the appellants failed in their principal ground based on the conveyance of 1925 and the continued possession of the late Shariff from 1925 until 1973. Counsel contended that the Board had

upheld the Commissioner's decision on the same grounds as those given by the Commissioner and on the erroneous assumption that the second Commissioner had seen the witnesses. He contended that neither the Board nor the Commissioner had evaluated the evidence of the witnesses on this issue which was conflicting. They did not say which part of the evidence they accepted and which part they rejected and there was moreover no evidence to support the finding that the parties were living together in the same house and later on in the same kampong. He pointed out that the claimants had adduced evidence to show that they had lived with the late Shariff who had paid the taxes and had exclusive possession of the said lands. Counsel also contended that the evidence of the respondents was full of contradictions and that the second Commissioner had not evaluated the conflicting evidence of the parties before making a decision.

In all the circumstances of this case and for the above reasons I therefore considered that although this was a long standing claim there should be another enquiry by a new Commissioner, and I hope that he would proceed with his enquiry at an early date. Should there be an appeal to the Board I also hope that it would not take them another three years to hear it so that the parties in this case can have their rights determined as early as possible.

Also found at [1983] 2 CLJ 27